

APPEAL NO. 031724
FILED AUGUST 19, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on June 13, 2003. The hearing officer resolved the disputed issues by deciding that the respondent/cross-appellant self-insured (referred to as carrier herein) did not waive the right to contest the compensability of the cervical spine by not timely contesting the injury in accordance with Section 409.021; that the appellant/cross-respondent's (claimant herein) compensable injury does not extend to include nonunion at C6-7 or pseudoarthrosis at C6-7; that the claimant's compensable injury extends to include painful hardware syndrome at C5-7; and that claimant has disability from February 2 to February 26, 2002, and from January 27 to February 6, 2003. The carrier appealed, disputing the determination that the compensable injury extends to include painful hardware syndrome and the determination that the claimant had disability from January 27 to February 6, 2003. The claimant responded, urging affirmance. The claimant appealed the determination that the carrier did not waive the right to contest the compensability of the cervical spine by not timely contesting the injury in accordance with Section 409.021. The carrier responded, urging affirmance.

DECISION

Affirmed as reformed.

The hearing officer has erroneously listed February 2, 2002, to February 26, 2002, in both Finding of Fact No. 10, Conclusion of Law No. 6, and the decision as a time period the claimant had disability. We reform this finding, conclusion, and determination to conform to the evidence presented at the CCH. The correct date that the claimant had disability was February 2 to February 26, 2001.

CARRIER WAIVER

The claimant had cervical fusion with hardware in 2000. It is undisputed that he was involved in work-related motor vehicle accident (MVA) on _____. The claimant contended the MVA caused the painful hardware symptoms. The evidence reflects and the parties seem to accept that the carrier initially accepted a cervical sprain/strain as part of the compensable injury and that the claimant received temporary income benefits for the time period he missed work from February 9 to February 26, 2001. The hearing officer specifically found that the carrier began the payment of benefits for the claimant's _____, injury not later than the eighth day after the carrier received written notice of the injury. The claimant did not dispute this finding of fact. There is no assertion that the carrier failed to comply with the 7-day provision in Section 409.021(a). The claimant appeals the determination that the carrier did not waive the right to contest the compensability of the cervical spine by not timely contesting the injury in accordance with Section 409.021(c) the 60-days provision. The

claimant argues that the carrier was well aware of the claimant's cervical injury and need for surgery no later than September 24, 2002, the date of their peer review report and that the carrier did not dispute the injury diagnosed as painful hardware syndrome at C5-7 until April 16, 2003, "well past the mandated sixty (60) days," citing Section 409.021(c). The 1989 Act does not contemplate multiple notices of injury and responses thereto. It is the first written notice of an injury, not discovery of facts constituting a defense, which begins the 7- and 60-day deadlines set out in Section 409.021. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 124.1(a) (Rule 124.1(a)); Texas Workers' Compensation Commission Appeal No. 93967, decided December 9, 1993. The Appeals Panel has held that the Employer's First Report of injury or Illness (TWCC-1) is, by definition under Rule 124.1, the first written notice of injury, and where one is filed, no resort to other records which fairly inform the carrier of injury need be made to calculate the deadlines. Texas Workers' Compensation Commission Appeal No. 021907, decided September 16, 2002. The TWCC-1 is not the last word on the scope of the injury that actually occurred. Texas Workers' Compensation Commission Appeal No. 992626, decided December 30, 1999. See also Texas Workers' Compensation Commission Appeal No. 021569, decided August 12, 2002, Texas Workers' Compensation Commission Appeal No. 021907, decided September 16, 2002, Texas Workers' Compensation Commission Appeal No. 022183, decided October 9, 2002, and Texas Workers' Compensation Commission Appeal No. 022454, decided November 19, 2002, where we have discussed when disputes were properly characterized as extent of injury or not depending on the factual circumstances of each case. Rule 124.3(c) provides that Section 409.021 does not apply to disputes of extent of injury. This is not a case where the carrier attempted to recast the primary injury as an extent-of-injury issue. The record does not reflect that surgery was considered prior to December 4, 2001. We affirm the hearing officer's determination that the carrier did not waive the right to contest the compensability of the cervical spine by not timely contesting the injury in accordance with Section 409.021.

EXTENT OF INJURY

The carrier argues that the claimant's evidence does not support that his alleged painful hardware syndrome is part of the compensable injury. Extent of injury is a question of fact. It was for the hearing officer, as the trier of fact, to resolve the conflicts and inconsistencies in the evidence and to determine what facts had been established. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). In view of the evidence presented, we cannot conclude that the hearing officer's disputed determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the decision and order of the hearing officer as reformed.

he true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**CR
(ADDRESS)
(CITY), TEXAS (ZIP CODE).**

Margaret L. Turner
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Robert W. Potts
Appeals Judge